UNITED STATES OF AMERICA	)	
	)	**Defense Reply to Prosecution**
v.	)	**Motion for Preliminary**
	)	**Determination of Admissibility**
MANNING, Bradley E., PFC	)	**of MRE 404(b) Evidence**
U.S. Army, (b) (6)	)	
Headquarters and Headquarters Company, US. Army)		
Army Garrison, Joint Base Myer-Henderson Hall)		
Fort Myer, Virginia 22211	)	**17 August 2012**

RELIEF SOUGHT

The Defense in the above-captioned case respectfully requests that this Court (1) close the Article 39(a) sessions of court during which evidence is adduced, argument is made, and the Court's ruling announced on this particular motion and (2) deny all of the prosecution's requests made in their corresponding 3 August 2012 motion. The Defense does request oral argument on this motion.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The prosecution bears the burden of persuasion as the moving party. The burden of proof is by a preponderance of the evidence. RCM 905(c).

FACTS

Closure of Court. This court-martial has received constant international media attention from the Summer of 2010 onward. Almost every Article 39(a) session of this Court has been well-attended by members of the media and widely reported in the news. (An internet news search conducted on 14 August 2012 received over 12,000 search results. Many of those results reported the events happening in this court-martial as they were happening.)

(b) (7)(C) B.M. The Defense has no objection to the facts rendered by the Government with respect to (b) (7)(C) B.M. and would be willing to stipulate to those facts contained in the second, third, and fourth paragraphs in the "facts" section of Government's motion for the limited purpose of this motion. Likewise, we would be willing to stipulate to Enclosures 1 and 2 of the Government's motion for the same limited purpose.

(b) (7)(C) J.S. The Defense is unwilling to stipulate to the testimony (b) (7)(C) J.S. and objects to the Court's considering the testimony of (b) (7)(C) J.S. during the Article 32 investigation, her sworn statement, or any sworn statements describing the alleged assault between (b) (7)(C) J.S. and PFC Manning in order to resolve any factual issue related to this motion. (The Defense also objects to the Court considering Enclosures 3, 4, and 5 of the Government's motion.) The Defense would draw the Court's attention to the entirety of (b) (7)(C) J.S. Article 32 testimony in order to better prepare the Court for her in-person testimony. Specifically, (b) (7)(C) J.S admits, among other things, that she (1) does not know what PFC Manning was thinking at the time he made the alleged disloyal statements and (2) does not know if PFC Manning was only making the alleged disloyal statements in order to annoy (b) (7)(C) J.S.

(b) (7)(C) P.B. The Defense has no objection to the facts rendered by the Government with respect to (b) (7)(C) P.B. and would be willing to stipulate to his testimony from

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the Article 32 investigation as well as Enclosure 6 of the Government's motion for the limited purpose of this motion .

LEGAL AUTHORITY

Court Closure
RCMs 806 and 912
U.S. v. Travers, 25 M.J. 61 (C.M.A. 1987)

Other Crimes, Wrongs, or Acts
MREs 401, 403, and 404
Huddleston v. U.S., 485 U.S. 681 (1988)
U.S. v. Reynolds, 29 M.J. 105 (C.M.A. 1989)
U.S. v. Castillo, 29 M.J. 145 (C.M.A. 1989)
U.S. v. Sweeny, 48 M.J. 117 (C.A.A.F. 1998)
U.S. v. Wright, 53 M.J. 476 (C.A.A.F. 2000)
U.S. v. McDonald, 56 M.J. 426 (C.A.A.F. 2004)
U.S. v. Berry, 61 M.J. 91 (C.A.A.F. 2005)
U.S. v. Rhodes, 61 M.J. 445 (C.A.A.F. 2005)
U.S. v. Hays, 62 M.J. 158 (C.A.A.F. 2005)
U.S. v. Harrow, 65 M.J. 190 (C.A.A.F. 2007)

ARGUMENT – COURT CLOSURE

The Defense requests that the Court be closed while it is hearing evidence, considering argument, and issuing its decision on this motion. Publicly airing the facts that gave rise to this motion now will impact PFC Manning's ability to receive a fair trial later, and there is no alternative to closure that will protect against that harm.

The applicable rule provides, in certain terms, that courts-martial "shall be open to the public..." See RCM 806(b)(2). This rule observes the long-standing principle that "...public confidence in matters of military justice would quickly erode if courts-martial were arbitrarily closed to the public." U.S. v. Travers, 26 M.J. 61, 62 (C.M.A. 1987). This right of the public may be curtailed by the Court only after ensuring the four-part test in RCM 806(b)(2) is satisfied: (1) there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (2) closure is no broader than necessary to protect the overriding interest; (3) reasonable alternatives to closure were considered and found inadequate; and (4) the military judge makes case-specific findings on the record justifying closure.

PFC Manning has an overriding interest in a trier-of-fact that is free from bias. See RCM 912 (allowing for the examination of court members to identify appropriate grounds for challenge, including bias). The Government uses their motion to accuse PFC Manning of striking a woman as well as open contempt for the American flag and the people it represents. There is a substantial probability that, if this hearing is conducted in open court, a potential member will read the news accounts related to this motion and form an opinion about PFC Manning, regardless of the Court's ruling on the underlying issues. Those allegations alone are enough to bias potential members against PFC Manning, and they will certainly be broadcast thoroughly enough for any member of the public to hear.

The Defense does not seek a blanket closure of all of the proceedings currently scheduled for 28-30 August 2012. We only seek closure for those proceedings in which this motion will be contemplated by the Court.

There are no reasonable alternatives that will address PFC Manning's overriding interest. The Discussion for RCM 806(b)(2) contemplates alternatives like expanding voir dire, continuing the proceedings, directing the members to ignore the media, selecting members from outside the immediate area or new arrivals, changing the place of trial, or sequestering members. First, the Court should disregard any remedy that contemplates interaction with members six months prior to trial. It is impractical to suggest to anyone that they ignore the news for a period of months. Furthermore, the court membership may well change in light of any number of unforeseen circumstances, and the venire would have to be replaced with members that may have read accounts or heard rumors of this motion. Second, the media attention for this case is national, if not international. Selecting new arrivals or moving the location of the court-martial will not avoid the saturation coverage. Finally, expanding voir dire will not address the serious harm that this information could cause PFC Manning. Panel members are all part of an organization dedicated to defending this country. Evidence like this may deeply influence their views on this case in a way that voir dire will not be able to adequately address.

Finally, if the Court is inclined to agree with this request for closure, then it must make case-specific findings on the record justifying closure. Those reasons stated above necessitate closure in this action.

ARGUMENT – 404(b)

The admissibility of other crimes, wrongs, or acts against a military accused for the purpose of showing some non-character rationale is well-settled. The Government's explanation of the rule in its motion is certainly serviceable. See Prosecution Motion, pages 2-3. Another description of this body of law can be found in U.S. v. McDonald, 59 M.J. 426, 428-29 (C.A.A.F. 2004).

YouTube Video Posting and Corrective Training. The Government seeks to elicit testimony of PFC Manning's "wrong" of discussing his duties as an intelligence analyst in a video he posted to YouTube in order to show his knowledge "...that information posted on the internet is accessible to and sought out by the enemy." See Prosecution Motion, page 4. The Defense concedes that an adequate factual foundation exists for this evidence.

This evidence fails the second prong of the 404(b) inquiry because it makes no fact of consequence more or less probable. Reynolds, 29 M.J. at 109. The government's problem here is one of causation. The fact of consequence (PFC Manning's knowledge) is not something that PFC Manning carries with him throughout the arc of the other act and is, therefore, relevant to determine his knowledge at the time of the charged offenses. PFC Manning's knowledge is caused by the corrective training administered by Mr. Medina. Contrast Huddleston v. U.S., 485 U.S. 681 (1988), a case cited by the government, with the facts at bar. In Huddleston, the government sought to introduce that his guilty knowledge with respect to stolen televisions was admissible evidence against him in a case involving stolen Memorex tapes. Huddleston, 485 U.S. at 682-83. In this case, the knowledge the Government wants PFC Manning to have comes not from PFC Manning, but from an outside source (b) (7)(C) B.M.

Assuming the second prong is satisfied, evidence of the YouTube video "wrong" fails the third prong of the 404(b) inquiry because its probative value is substantially outweighed by the danger of unfair prejudice. Reynolds, 29 M.J. at 109. We agree with the Government that the factors identified in U.S. v. Berry, 61 M.J. 91, 95 (C.A.A.F. 2005) are helpful to balance the interests necessary. In this case, the "wrong" of uploading a video to YouTube with "buzzwords" has little, if any, probative value. The true probative value lies in the actions taken

B.M.

by PFC Manning after the corrective training was administered by (b) (7)(C) (e.g. preparing a presentation for his fellow students about information security). Furthermore, the Government is free to put on evidence of the class given by PFC Manning without reference to the "wrong." A reasonable member is capable of understanding that an NCO, especially an NCO in a training environment, might task a junior enlisted Soldier to teach a class to his peers on a relevant subject for a variety of reasons. Finally, the time difference between the YouTube incident and the beginning of the first charged time period – more than a year – is great enough to find that the incidents are not "temporally proximate." Berry, 61 M.J. at 95, citing U.S. v. Wright, 53 M.J. 476 (C.A.A.F. 2000).

Disloyal Statements. The Government seeks to admit evidence from (b) (7)(C) J.S. that PFC Manning told her that "…the [American] flag meant absolutely nothing to him, and he had no allegiance to the United States or its people." This evidence is offered as proof of PFC Manning's "state of mind" or "intent." See Prosecution Motion at page 4.

(b) (7)(C) J.S. testimony with respect to the disloyal statements fails to meet even the meager standard included in the first prong of the 404(b) analysis. First, there is no record of (b) (7)(C) J.S. reporting this incident until after (1) PFC Manning allegedly assaulted her and (2) the allegations against PFC Manning became well known. Second, (b) (7)(C) J.S. herself cannot say what motivated PFC Manning to make these statements or exclude the possibility that PFC Manning was making these statements just to annoy her. (b) (7)(C) J.S. testimony alone, with respect to the disloyal statements, would not provide the reasonable support a trier-of-fact would need to make any determination in this matter.

Procedurally, the Defense would assert that the in-person testimony of (b) (7)(C) J.S. is vital for the Court to determine the first prong of the 404(b) inquiry. The Court's determination whether the evidence would support a finding by members should be done considering the same form of evidence that members will consider with (b) (7)(C) J.S. – in-person testimony.

Notwithstanding any conclusion made by the Court with respect to the first prong, (b) (7)(C) J.S. testimony regarding the disloyal statements also fails the second prong of the 404(b) inquiry. Her uncorroborated testimony does not make a fact of consequence more or less probable. Reynolds, 29 M.J. at 109. There are a substantial number of cases that discuss the use of "intent" as a non-character theory of relevance under MRE 404(b). See U.S. v. Sweeney, 48 M.J. 117 (C.A.A.F. 1998) (allowing evidence of stalking a previous wife in a trial for stalking current wife); U.S. v. Hays, 62 M.J. 158 (C.A.A.F. 2005) (allowing evidence of child pornographic videos and explicit emails about adult-child sexual contact in a trial for soliciting rape of a minor); and U.S. v. Harrow, 65 M.J. 190 (C.A.A.F. 2007) (allowing evidence of prior instances of child abuse in a trial for the unpremeditated murder of the same child). In general, the Court has to conclude that PFC Manning's state of mind was "…sufficiently similar to make the evidence of the prior acts relevant on the intent element of the charged offenses." U.S. v. McDonald, 59 M.J. at 430.

In the present case, the Government seeks to admit evidence of a statement that was made some months before the charged offenses in an environment in which PFC Manning was compelled to be present (a counseling session). The stated theory offered by the Government is that, in the moment he made the statement to (b)(7)(c) JS, he had a similar mindset to the times in the future when he committed the acts described in the charges and specifications. Unfortunately, the Government has proffered no evidence that indicates PFC Manning was motivated by some animus toward the United States or its people while he was allegedly committing the crimes charged. So, even if the Court is inclined to agree that these statements

are indicative of PFC Manning's intent, there is nothing to connect that intent with his intent during the charged offenses.

Assuming the first two prongs are satisfied, these disloyal statements fail the third prong of the 404(b) inquiry because the probative value of the evidence is outweighed by the danger of unfair prejudice. Reynolds, 29 M.J. at 109. First, there is again little temporal proximity between the uncharged misconduct and the charged offenses. In the least, it occurred months before PFC Manning deployed to Iraq in October 2009. Therefore, it was months before the first charged offense. Second, the disloyal statement happened only once under involuntary circumstances. The Government has not produced evidence of these types of disloyal statements occurring with any additional frequency as imagined by the Wright/Berry factors. Finally, the relationship between the parties must be considered because they fundamentally changed. PFC Manning's remarks to (b) (7)(C) J.S. were made while one junior enlisted Soldier was counseling another. The charged offenses were not done while PFC Manning was speaking with (b) (7)(C) J.S. They are alleged to have occurred while PFC Manning was sitting alone at government computers.

Assault on (b) (7)(C) J.S. The Government seeks to admit evidence that PFC Manning struck her in the face with his fist. This evidence is offered as proof of "…the timeline of the Accused's removal from the SCIF and placement in the Supply Room to work with (b) (7) P.B. (b) (7)(C) where the Accused's misconduct continued." See Prosecution Motion at page 5.

Assuming the appropriate finding of the Court with respect to the first prong, (the Defense is only willing to stipulate to (b) (7)(C) P.B. expected testimony and Enclosure 6 of the Prosecution Motion), the assault on (b) (7)(C) J.S. fails the second prong of the 404(b) inquiry because it does not make a fact of consequence more or less probable. Reynolds, 29 M.J. at 109. The Government's timeline is not a fact of consequence contemplated by MRE 404(b). The Government uses Castillo to assert that "…the sole test under [MRE] 404(b) is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime…" and insist their evidentiary timeline is an appropriate purpose. U.S. v. Castillo, 29 M.J. 145, 150 (C.M.A. 1989). The Defense contends this is a drastic misinterpretation of the both 404(b) and Castillo. The rule obviously contemplates the accused himself, and what his other actions may mean, in its title "Other Crimes, Wrongs, or Acts" and the factors listed in the actual text. That language helps the trier-of-fact interpret the behavior of the accused to resolve factual issues related to the accused, not the exigencies of proving the Government's case. The 404(b) evidence in Castillo was the history of sexually assaultive behavior between the accused and a stepdaughter. Castillo, 29 M.J. at 148-49. Other, non-listed factors approved by military appellate courts have included consciousness of guilt (see U.S. v. Rhodes, 61 M.J. 445 (C.A.A.F. 2005)), but none have gone as far as the Government does in its motion.

The only permissible theory the Defense could imagine for this evidence was opportunity. Essentially, PFC Manning's alleged assault on (b) (7)(C) J.S. and subsequent exile from the S2 Section to the Supply Room show his opportunity to use (b) (7)(C) P.B. computer. The problem with this strawman imagined by the Defense is again one of causation. There is no evidence to suggest that the assault on (b) (7)(C) J.S. by PFC Manning was done with the intention of giving himself the opportunity to use (b) (7)(C) P.B. computer. Contrast the instant facts with a situation in which an accused lies to gain access to an area and then steals something from that area. In a subsequent larceny trial, the government is free to discuss the other wrong of lying because that lie provided the opportunity to commit the larceny. PFC Manning's alleged assault is different from the hypothetical above because there is no evidence

to indicate the alleged assault was done with the intent to give him an opportunity to commit the actual charged offense.

Assuming the Court finds that both the first and second prong are satisfied, the assault on (b) (7)(C) J.S. fails the third prong of the 404(b) inquiry because the probative value is substantially outweighed by the danger of unfair prejudice. Reynolds, 29 M.J. at 109. The Government has indicated that this assault is probative for its ability to establish a timeline that the trier-of-fact will be able to understand during the presentation of evidence. That is scant probative value offered by the proponent of this evidence, especially when the danger of unfair prejudice is this great. The evidence for this uncharged misconduct indicates that PFC Manning, a man, struck (b) (7)(C) J.S. a woman, in the face with his closed fist. A plain reading of MRE 403 would necessitate closely examining this evidence, regardless of the rationale offered by the Government. It certainly compels excluding this evidence when the probative value offered is so low.

There are two other factors to consider. First, the Court can avoid this by directing the Government to elicit testimony from (b) (7)(C) P.B. that PFC Manning was assigned to work for him in the Supply Room from April 2010 until he was placed in pretrial detention. The members will certainly be able to understand that anyone wearing a uniform, especially junior enlisted Soldiers, may change job locations or duties daily performed for any number of reasons. Second, the Government knew of this misconduct at the time of its charging decision in this case and failed to include it as a charged offense. Simply put, the Government should not find refuge in 404(b) under these circumstances.

Impeachment. The Defense requests you deny the relief sought by the Government on pages 7 and 8 of its motion because the matter raised is not yet appropriate for a ruling. The Defense has not been called upon to identify its witnesses. We have not sought a ruling from the Court about the propriety of any defense or attempted to shield any witness from cross-examination. We accept that the Government can rebut "good Soldier" opinion evidence by asking if the witness "knew" or "had heard" about specific instances of conduct. The Defense likewise accepts that the "good faith" standard for asking "did you know" or "have you heard" questions is quite low. However, a ruling by this Court months before such evidence may be admitted is far too speculative. If the Defense elicits a "good Soldier" opinion AND if the Government asks a question that challenges the basis for the opinion AND if the Defense objects, then the Court will have before it a proper issue upon which to make a ruling. Until then, the Government's current request for relief should be denied.

CONCLUSION

The Defense respectfully requests that this Court (1) close the Article 39(a) sessions of court during which evidence is adduced, argument is made, and the Court's ruling announced on this particular motion and (2) deny all of the prosecution's requests made in their corresponding 3 August 2012 motion.

Thomas F. Hurley

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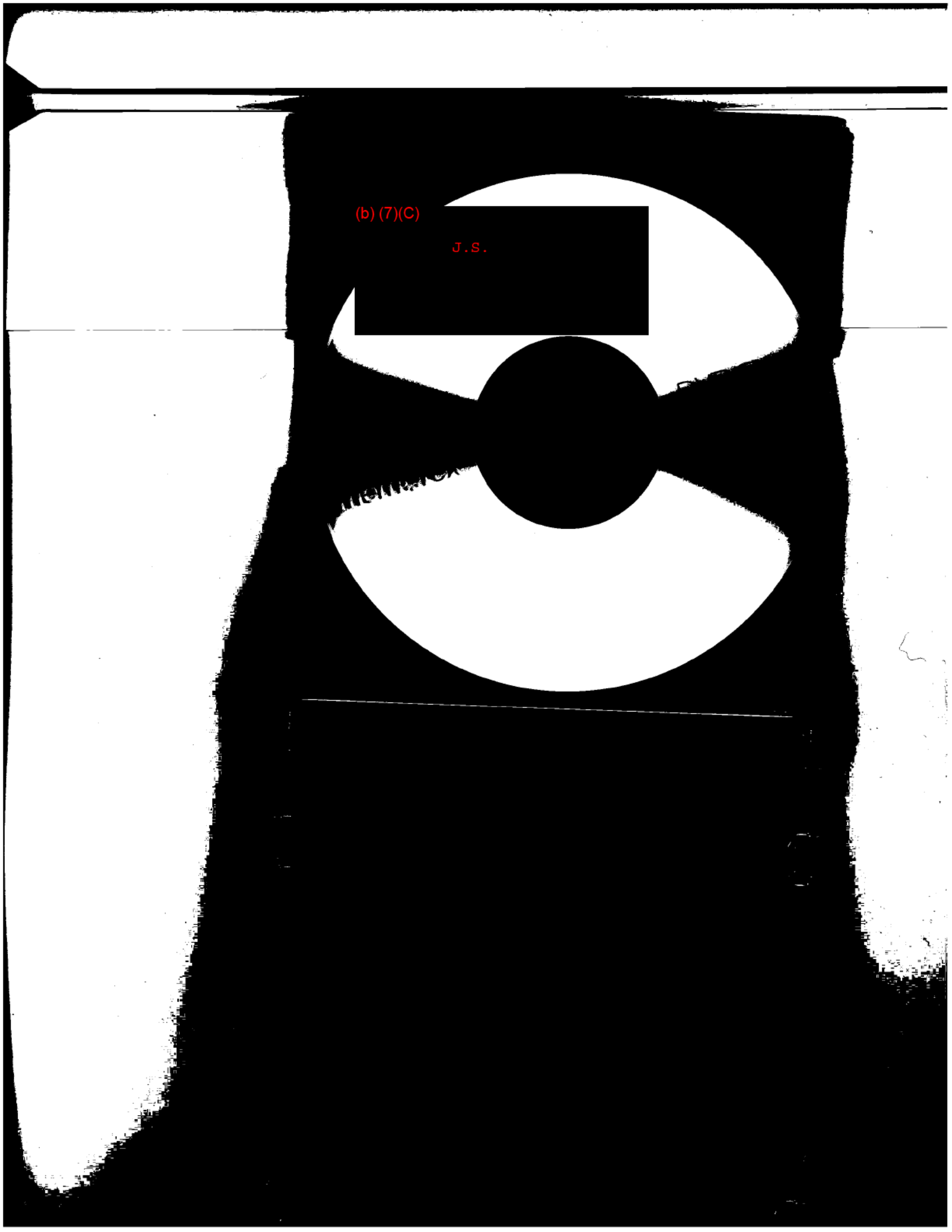
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